

**IN THE UNITED STATES DISTRICT COURT FOR  
THE NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 05-CV-329-TCK-SAJ
	)	
TYSON FOODS, INC., et al.,	)	
	)	
Defendants.	)	

**STATE OF OKLAHOMA'S RESPONSE TO "DEFENDANT  
COBB-VANTRESS, INC.'S SUPPLEMENTAL BRIEF IN SUPPORT  
OF FIRST MOTION TO COMPEL DISCOVERY"**

COMES NOW the Plaintiff, the State of Oklahoma, ex rel. W.A. Drew Edmondson, in his capacity as Attorney General of the State of Oklahoma, and Oklahoma Secretary of the Environment, C. Miles Tolbert, in his capacity as the Trustee for Natural Resources for the State of Oklahoma under CERCLA, ("the State"), and for its response to "Defendant Cobb-Vantress, Inc.'s Supplemental Brief in Support of First Motion to Compel Discovery"<sup>1</sup> ("Supplemental Brief") (DKT # 873) states as follows:

**I. INTRODUCTION**

In its Supplemental Brief, Defendant Cobb-Vantress, Inc. ("Defendant") asserts that "[r]ecent actions by the State are inconsistent with its position that the results of environmental sampling in the IRW by its experts are protected from disclosure as attorney work product." Supplemental Brief, p. 2. This assertion is groundless. Accordingly, Defendant's First Motion to Compel Discovery (DKT # 743) should be denied.

---

<sup>1</sup> Defendant Cobb-Vantress's First Motion to Compel Discovery is Docket No. 743.

## II. ARGUMENT

Defendant alleges that the State's Requests for Production and the Access Agreement Form are inconsistent with positions taken by the State in its opposition to the First Motion to Compel Discovery. Defendant is wrong on the facts and wrong on the law.

### A. **The State's Requests for Production are not inconsistent with the position taken by the State in its opposition to the First Motion to Compel Discovery**

In its July 10, 2006 Requests for Production, the State seeks from Defendant, *inter alia*, the following:

Request for Production No. 120: Please produce all documents and materials reflecting, referring to or relating to any testing or analyses performed by or on behalf of you on soils or lands located within the IRW.

Request for Production No. 121: Please produce all documents and materials reflecting, referring to or relating to any testing or analyses performed by or on behalf of you on surface waters located within the IRW.

Request for Production No. 122: Please produce all documents and materials reflecting, referring to or relating to any testing or analyses performed by or on behalf of you on ground waters located within the IRW.

Request for Production No. 123: Please produce all documents and materials reflecting, referring to or relating to any testing or analyses performed by or on behalf of you on edge-of-field run-off from lands located within the IRW.

Supplemental Brief, Exhibit A. Defendant alleges that the State's request for sampling information from Defendant is inconsistent with the State's position that certain of its own sampling information is subject to work product protection. The logic of Defendant's allegations is flawed in (at least) two respects. First, the State has never maintained that all of its sampling information is protected by the work product doctrine; rather, it is its sampling information prepared in anticipation of litigation and for trial that is protected. Indeed, the State expressly stated in its Response to the First Motion to Compel Discovery, p. 2, fn. 2, that "[i]t is anticipated that included within the State's initial disclosure of documents will be non-privileged documents relating to the sampling activities conducted by the State and the other entities (*e.g.*, the USGS)

in connection with their usual governmental functions." (DKT # 799) (emphasis added).

Consistent with this statement, on June 30, 2006, the State provided Defendant with an index of documents responsive to its discovery request that included sampling information created in connection with usual governmental functions. *See* Exhibit 1. Similarly, to the extent Defendant has sampling information in its possession, custody or control that was created in the course of its (or other's) usual business activities, such information is covered by the State's Requests for Production, is plainly not protected by the work product doctrine, and is clearly discoverable. The request for such information from Defendant is in no way whatsoever inconsistent with the position taken by the State in its opposition to the First Motion to Compel Discovery and is entirely consistent with the State's production to Defendant of sampling information created in connection with usual governmental functions.

The second flaw in Defendant's logic is that in the context of a request for production, it is not the request itself that brings information within the protection of the work product doctrine. Rather it is the assertion of a work product doctrine objection that does so. If no such work product protection objection is properly made, then the work product protection objection is waived. *See, e.g., Cardenas v. Dorel Juvenile Group, Inc.*, 231 F.R.D. 616, 618 (D. Kan. 2005) ("As Plaintiffs did not timely assert their privilege and work product objections in their initial response to this interrogatory, the Court deems them waived"); *Hall v. Sullivan*, 231 F.R.D. 468, 473 (D. Md. 2005) ("other courts addressing this issue have long ruled that a failure to raise an objection in an answer to a Rule 34 document production request may constitute a waiver"). Information not properly objected to must be produced to the requesting party. *See, e.g., Smith v. Logansport Community School Corp.*, 139 F.R.D. 637, 648 (N.D. Ind. 1991) ("having asserted no objection, she must produce all materials in her possession called for by the

request"). Given the position it has taken with respect to whether the State's sampling information prepared in anticipation of litigation and for trial is protected, *see* First Motion to Compel Discovery, it appears that Defendant, in contrast to the State, will not be asserting a work product objection to the State's Requests for Production seeking sampling information. Accordingly, the State is not precluded from seeking this information. This, however, is in no way inconsistent with the State's prerogative to assert its own legitimate claim of work product protection to similar sampling information that it has prepared in anticipation of litigation and for trial.

In sum, then, the State's Requests for Production are not inconsistent with the position taken by the State in its opposition to the First Motion to Compel Discovery. Instead, the State's Requests for Production merely place upon Defendant the same burden already placed by Defendant on the State: to produce its routine, non-privileged, non-protected sampling information, and to assert (to the extent it desires to do so) privilege or protection claims, supported by a privilege log, for that sampling information prepared in anticipation of litigation or trial.

**B. The Access Agreement Form is not inconsistent with the position taken by the State in its opposition to the First Motion to Compel Discovery**

Defendant alleges that the Access Agreement Form creates a waiver of the State's work product claim as to its sampling information.<sup>2</sup> Defendant's allegations are flawed in at least two respects. First, the fact is that no such sampling information has actually been disclosed to any

---

<sup>2</sup> Defendant also asserts in a footnote that it "is compelled to note the impropriety of contacts by attorneys or agents representing the State in this lawsuit with poultry growers." Supplemental Brief, p. 4, fn 3. Defendant is wrong on the ethics of such contacts to the extent any such contacts have occurred. *See, e.g.*, September 25, 2002 Order, *City of Tulsa v. Tyson Foods, Inc.*, 01-CV-900B(C), N.D. Okla. Should it ever be properly raised before the Court by Defendant, the State will address the matter at that time.

third party. Indeed, the Supplemental Brief does not allege that any such disclosure to a third party has occurred. Without an actual disclosure, a work product waiver as to Defendant has not occurred. *See, e.g., Johnson v. Gmeinder*, 191 F.R.D. 638, 647-48 (D. Kan. 2000) (no waiver where there is failure to prove actual disclosure of work product).

Second, even assuming arguendo that such a disclosure to a third party were to have occurred, such a disclosure would not necessarily constitute a waiver of the State's work product claim as to Defendant. *See, e.g., In re Grand Jury Subpoena*, 220 F.3d 406 (5th Cir. 2000) ("because the work product privilege looks to the vitality of the adversary system rather than simply seeking to preserve confidentiality, it is not automatically waived by the disclosure to a third party"); *McMorgan & Co. v. First California Mortgage Co.*, 931 F.Supp. 703, 709 (N.D. Cal. 1996) ("the majority rule is that disclosure to a third party does not automatically waive work product protection"). Simply put, Defendant's effort to cobble together an allegation of work product waiver based upon the Access Agreement Form fails.

### III. CONCLUSION

WHEREFORE, premises considered, the State respectfully requests that the Court deny the First Motion to Compel Discovery (DKT # 743).

Respectfully Submitted,

W.A. Drew Edmondson OBA # 2628  
 Attorney General  
 Kelly H. Burch OBA #17067  
 J. Trevor Hammons OBA #20234  
 Robert D. Singletary OBA #19220  
 Assistant Attorneys General  
 State of Oklahoma  
 2300 North Lincoln Boulevard, Suite 112  
 Oklahoma City, OK 73105  
 (405) 521-3921

C. Miles Tolbert OBA #14822  
Secretary of the Environment  
State of Oklahoma  
3800 North Classen  
Oklahoma City, Ok 73118  
(405) 530-8800

/s/ M. David Riggs  
M. David Riggs OBA #7583  
Joseph P. Lennart OBA #5371  
Richard T. Garren OBA #3253  
Douglas A. Wilson OBA #13128  
Sharon K. Weaver OBA #19010  
Robert A. Nance OBA #6581  
D. Sharon Gentry OBA #15641  
Riggs, Abney, Neal, Turpen,  
Orbison & Lewis  
502 West Sixth Street  
Tulsa, OK 74119  
(918) 587-3161

James Randall Miller, OBA #6214  
David P. Page, OBA #6852  
Louis Werner Bullock, OBA #1305  
Miller Keffer & Bullock  
222 S. Kenosha  
Tulsa, Ok 74120-2421  
(918) 743-4460

Frederick C. Baker  
(admitted *pro hac vice*)  
Elizabeth C. Ward  
(admitted *pro hac vice*)  
Motley Rice, LLC  
28 Bridgeside Boulevard  
Mount Pleasant, SC 29465  
(843) 216-9280

William H. Narwold  
(admitted *pro hac vice*)  
Motley Rice, LLC  
20 Church Street, 17<sup>th</sup> Floor  
Hartford, CT 06103  
(860) 882-1676

Attorneys for the State of Oklahoma

**CERTIFICATE OF SERVICE**

I hereby certify that on this \_\_\_\_ day of \_\_\_\_\_, 2006, I electronically transmitted the attached document to the following:

Jo Nan Allen jonanallen@yahoo.com, bacaviola@yahoo.com  
Robert Earl Applegate hm@holdenokla.com rapplegate@holdenokla.c  
Tim Keith Baker tbakerlaw@sbcglobal.net  
Douglas L. Boyd dboyd31244@aol.com  
Vicki Bronson vbronson@cwlaw.com, lphillips@cwlaw.com  
Paula M Buchwald pbuchwald@ryanwhaley.com, loelke@ryanwhaley.com  
Michael Lee Carr hm@holdenokla.com mcarr@holdenokla.com  
Bobby Jay Coffman bcoffman@loganlowry.com  
Lloyd E. Cole, Jr colelaw@alltel.net, gloriaeubanks@alltel.net; amy\_colelaw@alltel.net  
Angela Diane Cotner AngelaCotnerEsq@yahoo.com  
Reuben Davis; rdavis@boonesmith.com  
John Brian DesBarres mrjdbd@msn.com, JohnD@wcalaw.com  
Delmar R Ehrich dehrich@faegre.com, kcarney@faegre.com; ; qsperrazza@faegre.com  
John R Elrod jelrod@cwlaw.com, vmorgan@cwlaw.com  
William Bernard Federman wfederman@aol.com; law@federmanlaw.com,  
ngb@federmanlaw.com  
Bruce Wayne Freeman bfreeman@cwlaw.com, lcla@cwlaw.com  
Ronnie Jack Freeman jfreeman@grahamfreeman.com  
Robert W George robert.george@kutakrock.com, donna.sinclair@kutakrock.com  
Tony Michael Graham ! tgraham@grahamfreeman.com, <B! R  
James Martin Graves jgraves@bassettlawfirm.com  
Michael D Graves mgraves@hallestill.com, jspring@hallestill.com; smurphy@hallestill.com  
Thomas James Grever tgrever@lathropgage.com  
Jennifer Stockton Griffin jgriffin@lathropgage.com  
Carrie Griffith griffithlawoffice@yahoo.com  
Michael Todd Hembree hembreeawl@aol.com, traesmom\_mdl@yahoo.com  
Theresa Noble Hill thillcourts@rhodesokla.com, mnave@rhodesokla.com  
Philip D Hixon Phixon@jpm-law.com,  
Mark D Hopson mhopson@sidley.com, dwetmore@sidley.com; joraker@sidley! .com  
Thomas Janer SCMJ@sbcglobal.net; tjaner@cablone.net; lanaphillips@sbcglobal.net  
Stephen L Jantzen sjantzen@ryanwhaley.com, mantene@ryanwhaley.com;  
loelke@ryanwhaley.com  
Mackenzie Lea Hamilton Jessie maci.tbakerlaw@sbcglobal.net, tbakerlaw@sbcglobal.net;  
macijessie@aol.com  
Bruce Jones bjones@faegre.com, jintermill@faegre.com; bnallick@faegre.com  
Jay Thomas Jorgensen jjorgensen@sidley.com, noman@sidley.com  
Raymond Thomas Lay rtl@kiralaw.com, dianna@kiralaw.com; niccilay@cox.net  
Krisann Kleibacker Lee kklee@faegre.com, mlokken@faegre.com  
Nicole Marie Longwell Nlongwell@jpm-law.com, ahubler@jpm-law.com  
Dara D. Mann dmamm@faegre.com, kolmscheid@faegre.com  
Teresa Brown Marks teresa.marks@arkansasag.gov, dennis.hansen@arkansasag.com



Linda C Martin lmartin@dsda.com, mschooling@dsda.com  
Archer Scott McDaniel, Smcdanie1@jpm-law.com, jwaller@jpm-law.com  
Robert Park Medearis, Jr medearislawfirm@sbcglobal.net  
Charles Livingston Moulton charles.moulton@arkansasag.gov, Kendra.jones@arkansasag.gov  
John Stephen Neas, steve\_neas@yahoo.com  
George W Owens gwo@owenslawfirmmpc.com, ka@owenslawfirmmpc.com  
Chris A. Paul cpaul@jpm-law.com  
Marcus N Ratcliff mratcliff@lswsl.com, sshanks@lswsl.com  
Robert Paul Redemann@rredemann@pmrlaw.net, scouch@pmrlaw.net  
Randall Eugene Rose rer@owenslawfirmmpc.com, ka@owenslawfirmmpc.com  
Patrick Michael Ryan pryan@ryanwhaley.com, jmickle@ryanwhaley.com;  
kshocks@ryanwhaley.com  
Laura E. Samuelson lsamuelson@lswsl.com; lsamuelson@gmail.com  
Robert E Sanders rsanders@youngwilliams.com,  
David Charles Senger dsenger@pmrlaw.net, scouch@pmrlaw.net  
Jennifer Faith Sherrill jfs@federmanlaw.com, law@federmanlaw.com; ngb@federmanlaw.com  
Michelle B. Skeens hm@holdenokla.com mskeens@holdenokla.com  
William Francis Smith bsmith@grahamfreeman.com  
Monte W Strout strout@xtremeinet.net  
Colin Hampton Tucker chtucker@rhodesokla.com, scottom@rhodesokla.com  
John H Tucker jtuckercourts@rhodesokla.com  
R Pope Van Cleef !, Jr popevan@robertsonwilliams.com, kirby@robertsonwilliams.com;  
kmo@robertsonwilliams.com  
Kenneth Edward Wagner kwagner@lswsl.com, sshanks@lswsl.com  
David Alden Walls wallsd@wwhwlaw.com, lloyda@wwhwlaw.com  
Timothy K Webster twebster@sidley.com, jwedeking@sidley.com; ahorner@sidley.com  
Terry Wayen West terry@thewestlawfirm.com,  
Dale Kenyon Williams, Jr. kwilliams@hallestill.com, jspring@hallestill.com;  
smurphy@hallestill.com  
Edwin Stephen Williams steve.williams@youngwilliams.com  
J Ron Wright ron@wsfw-ok.com, susan@wsfw-ok.com  
Lawrence W Zeringue lzeringue@pmrlaw.net, scouch@pmrlaw.net  
  
N. Lance Bryan; lbryan@dsda.com  
Gary V. Weeks, gweeks@bassettlawfirm.com  
Thomas C. Green; tcgreen@sidley.com

I hereby certify that on this \_\_\_\_\_ day of \_\_\_\_\_, 2006, I served the foregoing document by U.S. Postal Service on the following:

Jim Bagby  
RR 2, Box 1711  
Westville, OK 74965



Gordon W. Clinton  
Susann Clinton  
23605 S Goodnight Ln  
Welling, OK 74471

Eugene Dill  
P O Box 46  
Cookson, OK 74424

Marjorie Garman  
5116 Highway 10  
Tahlequah, OK 74464

James C Geiger  
address unknown

G Craig Heffington  
20144 W Sixshooter Rd  
Cookson, OK 74427

Cherrie House  
William House  
P. O. Box 1097  
Stillwell, OK 74960

James Lamb, Dorothy Jean Lamb &  
James R. & Dorothy Jean Lamb dba Strayhorn Landing Marina  
Route 1, Box 253  
Gore, OK 74435

Jerry M. Maddux  
Selby, Connor, Maddox, Janer  
PO Box Z  
Bartlesville, OK 74005-5025

Doris Mares  
P O Box 46  
Cookson, OK 74424

Donna S Parker  
Richard E Parker  
34996 S 502 Rd  
Park Hill, OK 74451

Kenneth Spencer  
Jane T. Spencer  
Rt 1, Box 222  
Kansas, OK 74347

David R. Wofford  
Robin L. Wofford  
Rt 2, Box 370  
Watts, OK 74964

/s/ M. David Riggs

**INDEX OF DOCUMENTS PRODUCED ON JUNE 15, 2006 BY STATE OF OKLAHOMA  
AND PUBLICLY AVAILABLE DOCUMENTS RESPONSIVE TO  
INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS  
BY COBB-VANTRESS, INC. (FIRST SET)**

**I. Documents responsive to Interrogatory No. 1 and Request for Production No. 1.**

Currently identified responsive material to Interrogatory No. 1 and Request for Production No. 1 includes:

1. Responsive Information available on the following agency web sites -
  - Oklahoma Department of Environmental Quality
    - ▶ <http://sdwis.deq.state.ok.us/index.jsp>
    - ▶ <http://www.deq.state.ok.us/WQDnew/pubs.html>
  - United States Geological Society - General Water Quality Data
    - ▶ <http://pubs.usgs.gov/wdr/2005/wdr-ok-05-1/>
    - ▶ <http://ok.water.usgs.gov/>
  - Oklahoma Water Resources Board - General Monitoring Programs
    - ▶ <http://www.owrb.state.ok.us/quality/monitoring/bump.php>
    - ▶ <http://www.owrb.state.ok.us/studies/reports/bump/2004/bump2004.php#previous>
    - ▶ <http://www.owrb.state.ok.us/studies/reports/reports.php#illinois>
  - Oklahoma Conservation Commission - General Water Quality Material
    - ▶ [http://www.okcc.state.ok.us/WQ/WQ\\_reports.htm](http://www.okcc.state.ok.us/WQ/WQ_reports.htm)
2. Responsive information provided within the State's initial disclosure on June 15, 2006, by disk and bates number ranges -
  - Oklahoma Department of Agriculture
    - ▶ Disk 1: Bates Nos. OKDA0000001-OKDA0010561 and OKDA0013013-OKDA0021846
    - ▶ Disk 2: Bates Nos. OKDA0089223-OKDA0089484; Poultry 2000 Database, Poultry Waster Applicators Database, and Water Quality Database
  - Oklahoma Department of Environmental Quality
    - ▶ Disk 1: Bates Nos. OKDEQ0102043-OKDEQ0102101
  - Tahlequah Public Works Authority
    - ▶ Disk 1: Bates Nos. OKTPWA0000163-OKTPWA0000247

**II. Documents responsive to Request for production No. 2 may be found on the attached table of articles.**

**EXHIBIT**

**1**

ALL-STATE® INTERNATIONAL

**III. Documents responsive to Request for production No. 3.**

- ▶ Oklahoma Department of Agriculture
  - ▶ Disk 1: Bates Nos. OKDA0000001-OKDA0010561 and  
OKDA0013013-OKDA0021846

TITLE OF ARTICLE	AUTHOR	BATES RANGE
Contamination of Boone-St. Joe Limestone Groundwater by Septic Tanks and Chicken Houses	G.D. Cox, A.E. Ogden and G. Slavik	OK0000054-OK0000057
Agricultural Land Use Effects on Groundwater Quality in the Ozark Region	J.C. Admaski and K.F. Steele	OK0000058-OK0000079
Environmental Impacts of On-Farm Poultry Waste Disposal - A Review	D.R. Edwards and T.C. Daniel	OK0000080-OK0000104
Fecal Coliform and Streptococcus Concentrations in Runoff From Grazed Pastures in Northwest Arkansas	D.R. Edwards, M.S. Coyne, P.F. Vendrell, T.C. Daniel, P.A. Moore, Jr., and J.F. Murdoch	OK0000105-OK0000114
Resuspension of Viable Sediment-Bound Enteric Pathogens in Shallow Karst Aquifers	D. Marshall, J.V. Brahana, and R.K. Davis	OK0000115-OK0000123
Trophic Dynamics and Pollution Effects in Cave Springs Cave, Arkansas	G.O. Graening and A.V. Brown	OK0000124-OK0000171
Protection of Cave Springs Cave Biota and Ground Water Basin	G.O. Graening and A.V. Brown	OK0000172-OK0000211
Sediment and Bacterial Tracing In Mantled Karst at Savoy Experimental Watershed, Northwest Arkansas	K.S. Whitsett	OK0000212-OK0000288
Ecosystem Dynamics and Pollution Effects in an Ozark and A.V. Brown	G.O. Graening and A.V. Brown	OK0000289-OK0000299
Escherichia Coli Survival in Mantled Karst Springs and Streams, Northwest Arkansas Ozarks, USA	R.K. Davis, S. Hamilton and J.V. Brahana	OK0000300-OK0000308